



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable E. H. Griffin
County Attorney
Young County
Graham, Texas

Dear Sir:

Opinion No. 0-2972-A
Re: Reconsideration of Opinion
No. 0-2972.

Your letter of January 18, 1943, regarding the above mentioned opinion, in effect, calls for a reconsideration of said opinion No. 0-2972. We quote from your letter as follows:

"The County Auditor and I have been attempting to reconcile your opinion number 0-2972, delivered January 2, 1941, with Binford vs. Harris County, 261 S. W. 535 and McKinney vs. Collingsworth County, 259 S. W. (2) 234. As I construe the above cited cases they hold that the 15¢ paid the Sheriff under section 1 of Article 1040 CCP is not a fee of office and does not have to be accounted for by said officer. Your opinion above mentioned holds to the contrary.

"Please advise me which of these authorities should be followed. In so far as I have been able to determine your opinion has never been, by your department, modified or reversed."

When opinion No. 0-2972 was written we carefully considered the cases of Harris County v. Hammond et al., 203 S. W. 445; Binford v. Harris County, 261 S. W. 535; Nolan County v. Yarbrough, 34 S. W. (2) 302, and the authorities cited therein and recognized that these cases held, among other things, that the fifteen cents provided for under Section 1 of Article 1040, Vernon's Annotated Code of Criminal Procedure, did not constitute a fee of office that had to be accounted for as such. However, in view of Article 3891,

Vernon's Annotated Civil Statutes, as amended since the opinions in these cases were rendered, which provides in part:

"

"The compensation, limitations and maximums herein fixed shall also apply to all fees and compensation whatsoever collected by said officers in their official capacity, whether accountable as fees of office under the present law, and any law, general or special, to the contrary is hereby expressly repealed. The only kind and character of compensation exempt from the provisions of this Act shall be rewards received by Sheriffs for apprehension of criminals or fugitives from justice and for the recovery of stolen property, and moneys received by County Judges and Justices of the Peace for performing marriage ceremonies, which sum shall not be accountable for and not required to be reported as fees of office."

We were of the opinion that the above quoted terms of this statute (Article 3891, supra) were inclusive to the extent that in order for fees to be exempt thereunder, they must be specifically excluded. (See the cases of Nichols v. Galveston County, Supreme Court, 228 S. W. 547 and Ellis County v. Thompson, 66 S. W. 49). As later stated in the case of Taylor et al. v. Brewster County, 144 S. W. (2) 314, it was our opinion that "the change in the statute rather broadens than restricts what are to be determined official fees. Article 3891, R. S. 1925, Vernon's Annotated Civil Statutes, Article 3891". (See the case of Nueces County v. Curington et al., 162 S. W. 687). However, on February 16, 1942, after our opinion No. O-2972 was written, the Court of Civil Appeals of Texas, at Amarillo, in the case of McKinney v. Collingsworth County et al., 159 S. W. (2) 234, expressly held that the allowances to sheriffs for safe keeping of prisoners under Section 1 of Article 1040, Vernon's Annotated Code of Criminal Procedure, do not constitute fees of office but are mere perquisites of office for which the sheriff is accountable to no one. It will be noted that this case further holds that profits made under Section 2 of Article 1040, supra, relating to the allowances to a sheriff for the support and maintenance of prisoners should be reported as "fees of office".

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We think the opinion of the court in McKinney v. Collingsworth County et al., supra, should be followed until the Supreme Court holds to the contrary. Therefore, our opinion No. 0-2972 is expressly overruled and withdrawn.

This opinion is to be construed as applying only to those counties wherein the county officials are compensated on a fee basis.

Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

RECEIVED FEB 3, 1943
Ernest D. Allen

ASSISTANT
ATTORNEY GENERAL

Ardell Williams
By

Ardell Williams
Assistant

AW:mp

